Thomas S. West
Direct Dial: (518) 641-0501
E-Mail: twest@westfirmlaw.com
Admitted in New York and Pennsylvania

November 26, 2019

VIA ELECTRONIC AND
FIRST CLASS MAIL

Hon. L. Michael Mackey
NYS Supreme Court, Albany County
16 Eagle Street
Albany, New York 12207

RE: ***The Landmarks Society of Greater Utica et al.***
v. Planning Board of the City of Utica et al.
Index No. 02797-19

Dear Judge Mackey:

On behalf of the Plaintiffs-Petitioners ("Plaintiffs"), we submit this letter in response to the motions to strike by the Defendants-Respondents ("Defendants"). The Defendants' motions to strike are nothing more than another delay tactic to avoid the merits of this litigation while they continue to advance their accelerated building demolition schedule. For the reasons that follow, we respectfully submit that Defendants' motions to strike the amended pleadings should be denied.

First, the form of the instant suit is a hybrid declaratory judgment action/Article 78 proceeding, to which CPLR 3025 applies. Although, as part of their motions to dismiss, Defendants urge conversion to a pure Article 78 proceeding, Your Honor had not decided Defendants' motions at the time of service of the amended Complaint/Petition. Therefore, the Defendants' reliance on cases involving purely special proceeding (but not hybrid actions/proceeding) is misguided, as the procedures of CLPR 3025 remain apt. *See, e.g., Haberman v. Zoning Bd. of Appeals of City of Long Beach,* 119 A.D.3d 787, 791 (2d Dep't 2014) (citing CPLR 3025[b] in evaluating whether to grant leave in hybrid action/proceeding); *Rochester City School Dist. v. City of Rochester,* 108 N.Y.S.3d 739, 750 n.1 (Sup. Ct., Monroe Cnty., 2019) (involving hybrid declaratory judgment action/proceeding; stating that "[c]ourts are to be generous in regard to amending pleadings ... and the CPLR even affords amendments as of right in this exact scenario. *See* CPLR 3025[a]")

Under CPLR 3025(a), "[a] party may amend his pleading once without leave of court within twenty-one days after its service, or at any time prior to the period of responding to it expires..." The Defendants' pre-answer motion to dismiss pursuant to CPLR 3211(a)(2) and (a)(7) "extended the Defendants' time to answer (*see* CPLR 3211[f]) and, thus, extended the time in

which Plaintiffs could amend their complaint as of right." *E.g., STS Mgt. Dev., Inc. v. New York State Dept. of Taxation & Fin.*, 254 A.D.2d 409, 410 (2d Dep't 1998); *Perez v. Wegman Companies, Inc.*, 162 A.D.2d 959 (4th Dep't 1990). Moreover, where, as here, the pleading is amended as of right, (1) a plaintiff may add any cause of action at all, related or not to what the original pleading contained; and (2) the amended pleading "relates back to and speaks as of the time of the filing of the original pleading." *Iacovangelo v. Shepherd,* 5 N.Y.3d 184, 187 (2005) (citing *Abrams v. Community Servs., Inc.*, 76 A.D.2d 765, 766 [1st Dep't 1980]); *Jean v. Chinitz,* 163 A.D.3d 497, 498 (1st Dep't 2018). Accordingly, the amended Complaint/Petition is valid in all respects. *See, e.g., Kassab v. Kasab, unreported,* 63 Misc.3d 1216(A), 2019 WL 1592050, 2019 N.Y. Slip Op. 50544(U) (Sup. Ct., Queens Cnty., April 15, 2019) (involving hybrid action/proceeding; stating "[t]he amended complaint was timely e-filed ... and amended as of right" pursuant to CPLR 3025[a]).

Second, contrary to the Defendants' contentions, the amended pleading is proper, notwithstanding that the Defendant Planning Board issued its site plan approval after commencement of this litigation. While the line between an amended versus supplemental pleading is admittedly not always clear, an amendment is appropriate where the new cause of action is based upon the transactions alleged in and giving rise to the causes of action in the initial pleading. *See, e.g., Pendleton v. City of N.Y.,* 44 A.D.3d 733, 736-738 (2d Dep't 2007). Here, the "transactions" giving rise to all of the causes of action in the original pleading are (1) the invalid letter of resolution ("LOR"), and (2) the legally insufficient final environmental impact review process (i.e., deficient final environment impact statement ["FEIS"]). The new cause of action alleges that the Planning Board's site plan approval is infirm due to its reliance on the invalid LOR and legally deficient FEIS – that is, the new claim relies on the very same allegations/transactions set forth in the original pleading. Notably, Plaintiffs are not challenging the post-SEQRA-process manner in which the Planning Board implemented its local zoning regulation as to specific site plan features. Plaintiffs are challenging, however, the Planning Board's compliance with the State Environmental Quality Review Act ("SEQRA"), and that "transaction" is amply and unequivocally detailed in the original pleading. Consequently, the amended pleading is proper and leave was not required.

Third, even if leave to amend (or supplement) were required (which Plaintiffs respectfully maintain was not the case), leave should be freely granted absent prejudice to the other parties where (as here) the amendment in not plainly lacking in merit. *Lakeview Outlets, Inc. v. Town of Malta,* 166 A.D.3d 1445, 1446 (3d Dep't 2018) ("When leave is sought to amend a pleading, the movant need not establish the merits of the proposed amendment and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" [internal quotation and citation omitted]).

Given that the Defendants' motion to dismiss is still pending, there is no prejudice to Defendants. Moreover, despite Defendants' asserted statute of limitations argument, the additional cause of action "relates back" to the original pleading because, as noted above, it is based on the very same allegations in the original pleading (i.e., invalid LOR and defective SEQRA process/FEIS, making any approval based thereon invalid). *See Pendleton,* 44 A.D.3d at 737 ("A new claim relates back to the 'allegations' of an original complaint, not the causes of action"). Thus, because the new claim depends on (and therefore relates to) the very same allegations as in the original pleading, the relation back doctrine applies, rendering the new claim timely. *See id.* at 736-737 ("The sine qua non of the relation-back doctrine is notice…Where the allegations of the original complaint gave the defendants notice of the facts and occurrences giving rise to the new cause of action, the new cause of action may be asserted"; also stating "so long as an original complaint provides notice of the transactions or occurrences underlying a new claim, relation back is permitted, regardless of whether the legal theory pleaded in the original complaint has merit [*see* CPLR 203(f)]"). Consequently, if this Court finds that leave to amend or supplement was required, Plaintiffs respectfully request that leave be granted. *See also Schutz v. Finkelstein, Bruckman, Wohl, Most & Rothman,* 247 A.D.2d 460, 460-461 (2d Dep't 1998) (where defendants were on notice of the facts and circumstances giving rise to the new claim, the new claim relates back and is not time-barred).

For all these reasons, we respectfully maintain that the Defendants' motions to strike are meritless and merely another transparent means of obtaining delay while Defendants continue to raze buildings. Accordingly, we respectfully request guidance from Your Honor at the earliest opportunity to determine how this litigation will proceed before more buildings are demolished at the hands of the Defendants.

We appreciate this Court's consideration of these issues.

Very truly yours,

Thomas S. West

TSW/cmm

cc: Charles E. Diamond, Chief Clerk (via First Class mail)
Loretta Simon, Assistant Attorney General (via First Class and e-mail)
Yvonne E. Hennessey, Esq. (via First Class and e-mail)
Kathryn Hartnett, Esq. (via First Class and e-mail)
Kathleen Bennett, Esq. (via First Class and e-mail)